ZEN COURTS SDN BHD v.
BUKIT JALIL DEVELOPMENT SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
ABU SAMAH NORDIN FCJ
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
AZIAH ALI FCJ
[CIVIL APPEALS NO: 02(f)-38-05-2015(W) & 02(f)-39-05-2015(W)]
15 NOVEMBER 2016

COMPANY LAW: *Shares – Valuation – Sale of shares – Allegation of minority oppression – Order for buy-out shares – Valuation report prepared by mutually agreed valuer – Application by minority shareholders seeking representations be made on valuation report – Whether cross-examination of valuer in relation to valuation report permitted – Whether buy-out order would be varied – Whether buy-out order good, valid and intact – Companies Act 1965, s. 181*

The appellant, a minority shareholder of the second respondent, had filed a petition at the High Court under s. 181 of the Companies Act 1965 against the respondents. After a full hearing, the judge concluded that the second respondent had acted in a manner oppressive in the affairs of the first respondent company. *Vide* an order ('the buy-out order'), the second respondent, as the majority shareholder, was ordered to buy-out the appellant's 30% shareholding in the first respondent company. Ferrier Hodgson MH Sdn Bhd ('FHMH') the appointed joint valuer, duly completed the valuation and subsequently filed the final valuation report into the court. The appellant, however, was not satisfied with the value of its 30% shareholding valued at RM35.97 million as assessed by FHMH and claimed that the fair market value was RM262 million. Thus, the appellant filed encl. 80 at the High Court to make representations on the valuation report by way of cross-examination of the valuation reports. The second respondent also applied *vide* encl. 84 for the High Court to determine the final value based on the joint valuer's report. In opposing encl. 80, the second respondent averred that the appellant's application was not about making representations, but an attempt to impugn the valuation report prepared by a mutually agreed valuer, which was entirely outside the terms of the order of the court. The High Court Judge dismissed the appellant's application and simultaneously allowed the second respondent's application in encl. 84. The Court of Appeal subsequently dismissed the appellant's appeal against the High Court decision. Dissatisfied, the appellant appealed to this court. This appeal involved the interpretation of the buy-out order and whether the phrase 'the parties may apply' in sub-order (iv) of the buy-out order were connected to the filing of the valuation report; in short, whether the phrase 'the parties may apply' permitted the cross-examination of a valuer in relation to the valuation report.

Held (allowing encl. 80; setting aside encl. 84)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) The essence of the matter was the buy-out of the appellant's 30% shareholding of the first respondent company. What was left to be done by the court was to determine the final value of the shares. There was an express provision in sub-order (v) that the court shall determine the final value. The appellants were the alleged victims of the valuation made by FHMH, when the latter relied on the valuation prepared by Henry Butcher in respect of land area that was less than 10% of the size of the subject land. Apart from that, the comparative pieces of land selected were leasehold lands in Selangor, samples that were quite a distance away from the subject land, which incidentally was freehold land. The valuer based its valuation on the 2010 scale of gross development value of RM2.5 million, whereas it had increased to RM4.5 billion. There was thus a substantial and obvious difference, a factor which the FHMH's report had failed to take into account. (paras 20 & 21)

(2) Permitting the appellant to make representations on the valuation report by way of cross-examination of the valuation experts, by no account would vary the buy-out order. It makes good commercial sense that parties be entitled to challenge any valuation, if it were to be unreasonably high or low in the circumstances of the case. After ensuring that the valuation had not taken into account irrelevant considerations, or omitted relevant considerations that fundamentally affect the final value, the High Court may determine the value of the shares. It may thereafter make the necessary order, namely to confirm, vary or set aside the valuation report, in consonant with the buy-out order. Sub-order (v) which states that 'the court will determine the final value of the shares and the terms of the buy-out order' is not there for decoration but intended for a useful purpose. (para 23)

(3) Ultimately, whether an application for variation may be allowed under 'liberty to apply' depends very much on the purpose of the application, say, whether the application was necessary to obtain the decision of the court to enforce the agreement without varying the essence of the order, or whether it had the effect of varying that agreement. If it varied the essence of the agreement, then the application must fall outside the ambit of 'liberty to apply'. The order in terms to encl. 80, granting the appellants the right to cross-examine the valuer, call experts and adduce the necessary evidence if it wants to, in short, was the bolts and nuts, that were necessary to enforce the essence of the agreement. (paras 25 & 26)

(4) The order of the High Court in respect of encl. 84 was also set aside and the matter was directed to be sent back to the High Court for trial before a different judge. This setting aside order, by no stretch of the imagination had set aside the buy-out order, or taken away the essence of the agreement. In short, this buy-out order was still good, valid and intact. (para 27)

Bahasa Malaysia *Headnotes*

Perayu, pemegang saham minoriti responden kedua, memfailkan petisyen di bawah s. 181 Akta Syarikat 1965 terhadap responden-responden di Mahkamah Tinggi. Selepas perbicaraan penuh, hakim membuat kesimpulan bahawa responden kedua bertindak dengan cara yang menindas dalam hal ehwal syarikat responden pertama. Melalui satu perintah ('perintah belian saham'), responden kedua sebagai pemegang saham majoriti diperintahkan membeli 30% saham perayu dalam syarikat responden pertama. Ferrier Hodgson MH Sdn Bhd ('FHMH') penilai bersama yang dilantik, telah melengkapkan penilaian dan seterusnya memfailkan laporan penilaian akhir di mahkamah. Perayu, walau bagaimanapun, tidak berpuas hati dengan pemilikan saham 30% yang telah dinilaikan pada RM35.97 juta seperti ditaksirkan oleh FHMH dan mendakwa bahawa nilai pasaran saksama adalah RM262 juta. Oleh itu, perayu memfailkan lampiran 80 di Mahkamah Tinggi untuk membuat representasi atas laporan penilaian melalui pemeriksaan balas laporan penilaian. Responden kedua juga memohon melalui lampiran 84 untuk Mahkamah Tinggi menentukan nilai akhir berdasarkan laporan penilai bersama. Dalam menentang lampiran 80, responden kedua menegaskan bahawa permohonan perayu bukan tentang membuat representasi, tetapi satu cubaan meragui laporan penilaian yang disediakan oleh penilai yang disetujui bersama, yang sepenuhnya berada luar terma perintah mahkamah. Hakim Mahkamah Tinggi menolak permohonan perayu dan pada masa yang sama membenarkan permohonan responden kedua dalam lampiran 84. Mahkamah Rayuan kemudiannya menolak rayuan perayu terhadap keputusan Mahkamah Tinggi. Tidak berpuas hati, perayu merayu ke mahkamah ini. Rayuan ini melibatkan tafsiran perintah belian saham dan sama ada frasa 'the parties may apply' dalam sub-perintah (iv) perintah belian saham berhubung pemfailan laporan penilaian; secara ringkasnya, sama ada frasa 'the parties may apply' membenarkan pemeriksaan balas penilai berhubung laporan penilaian.

Diputuskan (membenarkan lampiran 80; mengetepikan lampiran 84)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Intipati perkara adalah belian 30% saham milik perayu dalam syarikat responden pertama. Apa yang perlu dibuat oleh mahkamah adalah menentukan nilai akhir saham-saham. Terdapat peruntukan nyata dalam sub-perintah (v) bahawa mahkamah harus menentukan nilai akhir.

Perayu-perayu adalah mangsa penilaian yang dibuat oleh FHMH, apabila FHMH bergantung pada penilaian yang disediakan oleh Henry Butcher berkenaan kawasan tanah yang kurang daripada 10% daripada saiz tanah yang dipertikaikan. Selain itu, bidang tanah komparitif yang dipilih adalah tanah pegangan pajak di Selangor, contoh yang agak jauh dari tanah yang dipertikaikan, yang kebetulan adalah tanah pegangan bebas. Penilai berdasarkan penilaiannya atas 2010 skala pembangunan kasar RM2.5 juta, sedangkan ini meningkat ke RM4.5 bilion. Oleh itu, terdapat perbezaan besar dan jelas, satu faktor yang gagal diambil kira oleh laporan FHMH.

(2) Membenarkan perayu membuat representasi atas laporan penilaian melalui pemeriksaan balas laporan penilaian, tidak akan mengubah perintah belian saham. Ini satu aspek komersial yang baik untuk memberikan hak membantah apa-apa penilaian kepada pihak-pihak yang terlibat, jika terlalu tinggi atau rendah dalam keadaan kes. Selepas memastikan penilaian gagal mengambil kira pertimbangan yang tidak relevan atau mengabaikan pertimbangan yang relevan yang boleh pada dasarnya menjejaskan nilai muktamad, Mahkamah Tinggi boleh menentukan nilai saham. Mahkamah boleh seterusnya membuat perintah yang perlu, iaitu untuk mengesah, mengubah atau mengetepikan laporan penilaian, selari dengan perintah belian saham. Sub-perintah (v) yang menyatakan 'the court will determine the final value of the shares and the terms of the buy-out order' bukan sekadar hiasan tetapi dimaksudkan untuk satu matlamat penuh.

(3) Akhirnya, sama ada satu permohonan untuk variasi boleh dibenarkan di bawah 'liberty to apply' bergantung pada tujuan permohonan itu, sama ada permohonan adalah perlu bagi memperolehi keputusan mahkamah untuk menguatkuasakan perjanjian tanpa mengubah intipati perintah, atau sama ada mempunyai kesan mengubah perjanjian. Jika ini mengubah intipati perjanjian, permohonan jatuh luar lingkungan 'liberty to apply'. Perintah terma tentang lampiran 80, yang memberikan perayu-perayu hak memeriksa balas penilai, memanggil pakar-pakar dan mengemukakan keterangan yang memadai, secara ringkas, perlu untuk menguatkuasakan intipati perjanjian.

(4) Perintah Mahkamah Tinggi berkenaan lampiran 84 juga diketepikan dan perkara ini diperintahkan dihantar semula ke Mahkamah Tinggi untuk perbicaraan di hadapan hakim yang berbeza. Perintah pengetepian tidak mengetepikan perintah belian saham atau mengambil intipati perjanjian. Secara ringkas, perintah belian saham adalah masih teratur, sah dan tidak terjejas.

Case(s) referred to:
Campbell v. Edwards [1976] 1 All ER 785 ***(refd)***
Cristel v. Cristel [1951] 2 All ER 574 ***(refd)***
Tong Lee Hwa & Anor v. Chin Ah Kwi [1971] 1 LNS 143 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181(2)(c)

For the appellant - Gopal Sri Ram, JR Tey & David Yii; M/s Chooi, Saw & Lim
For the 1st respondent - John Skelchy; M/s James Monteiro
For the 2nd respondent - Cyrus Das, Malik Imtiaz Sarwar & Yoong Nim Chor; M/s Yoong & Partners

[Editor's note: For the Court of Appeal judgment, please see Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors & Another Appeal [2016] 1 CLJ 420 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The appellant, a minority shareholder of the second respondent, had filed a petition under s. 181 of the Companies Act 1965 against the respondents. After a full hearing, Abdul Aziz J (as he then was) concluded that the second respondent had acted in an oppressive manner in the affairs of the first respondent company. *Vide* order dated 27 March 2012 (the buy-out order) per exh. YKT1, the second respondent as the majority shareholder, was ordered to buy-out the appellant's 30% shareholding in the first respondent company. The buy-out order reads as follows:

(i) That the second respondent shall buy-out all the 4,500,000 shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis, such valuation to be as at the date of this order.

(ii) That the appointment of the independent valuer is to be mutually agreed by the petitioner and the second respondent and in the event these parties cannot agree to the independent valuer, either of those parties is at **liberty to apply** to court to appoint a valuer.

(iii) That the valuation is to be done within three months from the date of this order and the parties may make representations to the valuer as to the valuation.

(iv) That the valuer shall file the valuation report into court and the parties **may apply**.

(v) That the court will determine the final value of the shares and the terms of the buy-out order.

(vi) That the costs of the valuation shall be borne and paid by the first respondent.

(vii) That should the second respondent be unable to proceed with the buy-out, the petitioner shall be at **liberty to apply**.

(viii) That the costs of this petition of RM50,000 which, includes all previous orders for costs in the cause, shall be paid by the second and third respondents to the petitioner.

(ix) No order as to costs against the first respondent.

(x) That parties shall be at **liberty to apply** (emphasis added).

[2] Ferrier Hodgson MH Sdn Bhd (FHMH), which was appointed by both parties as the joint valuer, duly completed the valuation and subsequently filed the final valuation report into court.

[3] However, the appellant was not satisfied with the value of its 30% shareholding valued at RM35.97 million as assessed by FHMH. It claimed that the fair market value was RM262 million. Being dissatisfied, the appellant filed encl. 80 at the High Court to 'make representations on the valuation report by way of cross-examination of the valuation experts'. The grounds of the application, *inter alia*, are as follows:

(i) There are express provisions in the buy-out order that state that parties are at liberty to apply. In any case, the court always retain the power to make further orders ancillary to or in relation to the valuation report.

(ii) FHMH prepared a draft valuation report which invited parties to comment on it. The appellant specifically responded by counter offering a valuation done by Hartanah Consultants (Valuation) Sdn Bhd (Hartanah).

(iii) The joint valuer (FHMH), applied the wrong considerations when it relied on the valuation report of Henry Butcher in respect of the value of the land. FHMH disregarded the higher valuation conducted by the appellant's valuer ie, Hartanah, on the gross development value of the most priced asset of the first respondent company.

(iv) The applicant averred that it would be just and reasonable that sufficient material be provided for an adequate valuation.

[4] The second respondent also applied *vide* encl. 84, for the High Court to determine the final value based on the joint valuer's report, and for consequential orders to give effect to the purchase of the shares. In opposing encl. 80, the second respondent averred that the appellant's application was not about making representations, but an attempt to impugn the valuation report prepared by a mutually agreed valuer. This was entirely outside the terms of the order of the court.

[5] The second respondent also submitted that the report before the court was fair, considered, balanced and had taken into account all presentations and representations of the parties.

Findings Of The High Court And The Court Of Appeal

[6] The High Court Judge (Mary Lim J) who heard encl. 80 dismissed the appellant's application and simultaneously allowed the second respondents application in encl. 84. Her Ladyship fixed the final buy-out price of the shares as valued by the joint valuer.

[7] The main consideration before the learned judge revolved on the meaning of 'parties at liberty to apply' or 'parties may apply' as contained in the buy-out order.

[8] The learned judge held that pursuant to the order of court dated 27 March 2012, while parties are at liberty to apply to court after the valuation report has been filed, it is only on matters pertaining to the "working out of the actual terms of the order"; and not on matters that the court has already ruled or ordered. This is regardless of the 'liberty to apply' term; and despite it being repeatedly used in the order. Such term is only in respect of matters that are "necessary to carry" the order of the court of 27 March 2012 into effect.

[9] The appellant appealed to the Court of Appeal in a singular notice of appeal against the decision of Mary Lim J in respect of the abovementioned encls. 80 and 84. On 19 February 2014, the appeal was dismissed by the Court of Appeal.

[10] Being dissatisfied with the decision of the Court of Appeal, the appellant applied for leave, and on 5 May 2015 successfully obtained leave from us, on the following questions of law:

(a) whether a court is entitled to review a speaking valuation of property prepared by a valuer jointly appointed by parties to a litigation based on the decision in *Campbell v. Edwards* [1976] 1 All ER 785; and

(b) whether the principle governing liberty to apply established in *Cristel v. Cristel* [1951] 2 All ER 574 and applied in *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 1 LNS 143; [1971] 2 MLJ 75 is excluded by a provision in an order of court that the court shall determine the final value of shares that are the subject of a compulsory purchase order made pursuant to s. 181(2)(c) of the Companies Act 1965.

[11] A perusal of the notice of appeal to the Federal Court filed by the appellant, again showed that it was an appeal against the whole decision of the Court of Appeal that affirmed the High Court's decision, pertaining to encls. 80 and 84. Having traced the chronology and antecedent of the case, and having considered the submissions of parties, we then proceeded to hear the appeal.

[12] Our main constraint was that the leave questions concerned the issue of whether the phrase, 'parties may apply' in sub-order (iv) of the buy-out order, and the phrase 'liberty to apply' that were incorporated in that buy-

out order, must be construed in a limited context or not. Issues arose whether they simply were devices by which further orders might be made when necessary, for the purpose of implementing and giving effect to the terms of the court order, and whether they referred to the right of parties to seek out further directions as to the working out of the actual terms of the order.

[13] Therefore, this appeal involved the interpretation of the buy-out order dated 27 March 2012, and whether the phrase 'the parties may apply' in sub-order (iv) of the buy-out order are connected to the filing of the valuation report; in short, whether the phrase 'the parties may apply' permits the cross-examination of a valuer in relation to the valuation report.

[14] In *Cristel v. Cristel* [1951] 2 All ER 574, the phrase 'liberty to apply' was discussed at some length by Somervell LJ. To appreciate the discussion of this phrase, the facts in the latter case will have to be reproduced. In brief, the parties *viz.* the estranged husband and wife, had recorded a consent order which required the wife to give up possession of the place of residence to the husband, such order to be suspended, "until the husband provides suitable alternative accommodation … by providing a two or three bedroomed house or bungalow … either by renting the same … or by purchase." In the consent order, parties were at liberty to apply to court. Later, the husband took out a summons to vary the consent order by adding the words "or flat" after "… bungalow". Before the Master, the husband's application was disallowed. On appeal, the High Court Judge allowed the appeal. The Court of Appeal took a different view and overturned the High Court's order and refused the variation sought for by the husband; and this was despite the phrase 'liberty to apply' being inserted in the abovementioned consent order.

[15] Somervell LJ when allowing the appeal made the following remarks:

> … *Prima facie,* "liberty to apply" is expressed very often and, if it is not expressed, it will be implied where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. *Prima facie*, certainly, it does not entitle people to come and ask that the order itself shall be varied.

[16] Somervell LJ held the view that 'liberty to apply' should not be given a too wide berth, and *prima facie*, refers only to the working of the actual terms of the order. He concluded that the words 'or flat' could not be inserted as it was a plain alteration of what had been agreed upon. Lord Denning LJ likewise held the view that the court could not alter or vary the agreement of the parties under the phrase 'liberty to apply' in the circumstances of the case. The court could only do what was necessary to carry the agreement into effect.

[17] This principle of *Cristel v. Cristel* was applied in *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 1 LNS 143; [1971] 2 MLJ 75. In *Tong Lee Hwa*, in order to settle the ongoing dispute, and in order to reduce litigation costs, a consent order was agreed upon before the judge. Amongst the terms agreed

upon were that Chin Ah Kwi (the respondent) was to have the option to purchase 2,100 shares belonging to the appellants in the disputed company. The phrase 'liberty to apply' was also inserted in the consent order. Clause 4, which was inserted into the consent order required the completion of the option to buy to be completed by 29 February 1970. In a stroke, time to be the essence of the consent order, was ensured.

[18] Later, the first defendant took out a notice of motion in which he asked that the date of 29 February 1970 be substituted to "such date as should seem fit and proper to the court". When rejecting the respondent's submission, leading to the appeal being allowed, the Federal Court referred to *Cristel v. Cristel* and said:

> With respect to the learned judge, the words "liberty to apply" in an order, *prima facie*, mean that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they do not confer any right to ask the court to vary the order.

[19] The Federal Court opined that "the clear purpose of settlement was to enable the disputing parties in Probate Suit No. 3 of 1969 to gain control over the affairs of the company, thereby avoiding the heavy cost of litigation which might otherwise have arisen." When allowing the appeal, Ali FJ stated that the respondent was given approximately ten weeks to decide whether or not to buy the shares. Under para. 4 of the schedule, time was of the essence of the settlement, and the respondent was not obliged to buy the shares, though it was in the interest of the company that the dispute be resolved quickly in order to avoid costly litigation. By making time not of the essence, the variation applied for therefore, failed to fall under the phrase 'liberty to apply', but rather a variation of the consent order.

[20] In the current appeal before us, the essence of the matter was the buy-out of the appellant's 30% shareholding of the first respondent company. What was left to be done by the court was to determine the final value of the shares. There is express provision in sub-order (v) that the court shall determine the final value.

[21] The appellant who filed encl. 80 is the alleged victim of the valuation made by FHMH, when the latter relied on the valuation prepared by Henry Butcher in respect of land area that is less than 10% of the size of the subject land. Apart from that, the comparative pieces of land selected were leasehold lands in Selangor, samples that were quite a distance away from the subject land, which incidentally is freehold land. The valuer based its valuation on the 2010 scale of gross development value of RM2.5 million, whereas it has increased to RM4.5 billion, excluding car parks in 2012 (FHMH's report dated 31 December 2012). There is thus a substantial and obvious difference, a factor which the FHMH's report has failed to take into account.

[22] On completion of the hearing on 26 April 2016, it being such a straightforward appeal, we promptly (without the need to CAV the matter) meted down our decision. We allowed the appeal with costs of RM50,000. Her Ladyship's orders were set aside whereupon we allowed the application of encl. 80. We were satisfied that the application of determining the final value of the shares, as prayed for in encl. 80, would fall squarely within the context of the phrase 'liberty to apply' and was not a variation of the consent order.

[23] Permitting the appellant to make representations on the valuation report by way of cross-examination of the valuation experts, by no account would vary the buy-out order. In fact, it does make good commercial sense that parties be entitled to challenge any valuation, if it were to be unreasonably high or low in the circumstances of the case. After having been appraised of the evidence before it, that is after ensuring that the valuation has not taken into account irrelevant considerations, or omitted relevant considerations that fundamentally affect the final value, the High Court may determine the value of the shares. It may thereafter make the necessary order, namely to confirm, vary, or set aside the valuation report, in consonant with the buy-out order. Sub-order (v) which states that 'the court will determine the final value of the shares and the terms of the buy-out order', is not there for decoration but intended for a useful purpose.

[24] In *Cristel v. Cristel (supra)* the essence of the consent order was that the wife was to be provided for with nothing less than a bungalow (a flat was a far cry from a bungalow); in *Tong Lee Hwa & Anor v. Chin Ah Kwi* the essence of the consent order was that the option to buy was by 29 February 1970 (and not any open-ended date), whilst the essence in this appeal was the buy-out of the appellants' 30% shareholding in the first respondent company (and not the value of the shares).

[25] Ultimately, whether an application for variation may be allowed under 'liberty to apply' depends very much on the purpose of the application, say, whether the application is necessary to obtain the decision of the court to enforce the agreement without varying the essence of the order, or whether it has the effect of varying that agreement. If it varies the essence of the agreement, then the application must fall outside the ambit of 'liberty to apply'.

[26] Our 'order in terms' to encl. 80, granting the appellant the right to cross-examine the valuer, call experts and adduce the necessary evidence if it wants to, in short was the bolts and nuts, that were necessary to enforce the essence of the agreement.

[27] We also set aside the order of the High Court in respect of encl. 84 and directed that the matter be sent back to the High Court for trial before a different judge. Effectively, the new judge is to hear encl. 84 and determine

the final value of the shares, in accordance with Abdul Aziz J's direction. This setting aside order, by no stretch of the imagination had set aside the buy-out order of 27 March 2012 or taken away the essence of the agreement. In short, this buy-out order is still good, valid and intact.

[28] In view of the facts and circumstances of this case, we found it unnecessary to answer the leave questions as laid down at para. 10 above.

[29] On 6 September 2016, we received a letter bearing the same date, requesting this court to supply a written grounds of judgment; and this 'grounds of judgment' is our response to the request.